

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Closed Captioning of Video Programming)	
)	CG Docket No. 05-231
Telecommunications for the Deaf, Inc.)	
Petition for Rulemaking)	
)	

REPLY COMMENTS OF HUBBARD BROADCASTING, INC.

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I. INTRODUCTION AND SUMMARY

Hubbard Broadcasting, Inc. ("HBI"), by its attorneys, hereby submits its Reply to the comments filed in response to the Commission's *Notice of Proposed Rulemaking*, FCC 05-142 (rel. July 21, 2005) ("NPRM").¹ The *Notice of Proposed Rulemaking* was issued in response to a petition by Telecommunications for the Deaf, Inc. ("TDI").² On November 10, 2005, HBI filed its Comments which support television programming access for the deaf but providing a factual record demonstrating that the proposals in this proceeding would be so burdensome as to drive local news and other local programming at smaller market TV stations toward extinction.³ To prevent drastic reductions or outright eliminations of local programming in smaller market television stations, HBI focuses this Reply on the unwarranted proposals of elimination of

¹ Pursuant to the *Order* released on July 21, 2004 in this proceeding, this Reply is timely filed. See *Closed Captioning of Video Programming*, Notice of Proposed Rulemaking, CG Docket No., 05-231(rel. July 21, 2004)("Captioning Order").

² See *Telecommunications for the Deaf Inc., et al.*, Petition for Rulemaking, RM-11065 (July 23, 2004) ("TDI Petition").

³ *Comments of Hubbard Broadcasting, Inc.*, Closed Captioning of Video Programming, CG Docket No., 05-231 (filed Nov. 10, 2005) ("HBI Comments").

electronic newsroom technique ("ENT") captioning, imposition of poorly defined and largely unachievable quality standards, and creation of harsh and inappropriate base forfeitures. In addition, HBI shows that the record established by many of the comments of the parties in this proceeding, including proponents of the TDI Petition, clearly establish that TDI's suggestions must be dismissed.

II. THE BURDENS OF INCREASED CAPTIONING OBVIOUSLY OUTWEIGH THE BENEFITS

The record in this proceeding establishes across industry lines that, broadcast, cable, and satellite television, other telecommunications providers and the movie industry are united in support of retaining existing captioning rules and refraining from the imposition of the proposed additional obligations.⁴ While broadcasters share a universal concern with the rising costs of programming content, they have unique regulatory obligations, and necessarily must be the focus of the Commission in this proceeding.

Broadcasters are besieged by millions of dollars in digital television ("DTV") transition costs. For example, as HBI demonstrated in its Comments, the digital conversion for its stations,

⁴ *Comments of the National Association of Broadcasters*, Closed Captioning of Video Programming, CG Docket No., 05-231 (filed Nov. 10, 2005) ("NAB urges the Commission to refrain from imposing additional regulations on television broadcast stations at this time.") *Comments of the EchoStar Satellite*, Closed Captioning of Video Programming, CG Docket No., 05-231 (filed Nov. 10, 2005) ("[N]ew requirements would impose significant costs on multichannel video programming distributors . . . without translating into meaningful improvements to the quality and integrity of the closed captioning process.") *Comments of the American Cable Ass'n*, Closed Captioning of Video Programming, CG Docket No., 05-231 (filed Nov. 10, 2005) ("Changes to these [closed captioning] rules are unwarranted.") *Comments of the United States Telecom Ass'n*, Closed Captioning of Video Programming, CG Docket No., 05-231 (filed Nov. 10, 2005) ("[N]o changes to current rules should come from this proceeding arising out of the petition filed by Telecommunications for the Deaf, Inc."). *Comments of the Motion Picture Ass'n of America*, Closed Captioning of Video Programming, CG Docket No., 05-231 (filed Nov. 10, 2005) ("[T]he most efficient and effective way to ensure continued high-quality captioning is to allow the industry to continue to meet viewers' demand without further regulation.")

WDIO-TV, Duluth, Minnesota, and KAAL(TV), Austin, Minnesota, are estimated to cost approximately \$3.5 and \$2 million, respectively.⁵ Broadcasters also face new regulatory burdens due to expanded children's programming obligations and a mandatory upgrade of the Emergency Alert System equipment.⁶

Instead of imposing new regulatory requirements, the Commission should recognize that the DTV transition efforts, children's programming obligations, the Emergency Alert System requirements and the January 2006 full non-exempt captioning requirement already impose significant burdens on broadcasters.⁷ Each regulatory burden creates cumulative effects and must not be analyzed in a vacuum. Regulatory compliance affects staffing considerations, budgetary issues, and even programming schedules. As HBI established in its Comments and as further described below, the costs of compliance with TDI's proposals are wildly excessive in comparison to smaller market TV news operations.⁸ The public interest will be served by rejecting TDI's requests and thus preserving localism.

A. Increased Real-Time Captioning Obligations Create an Insurmountable Burden for Smaller Broadcasters

The NAB correctly states that the FCC must balance "the goal of achieving full accessibility with economic and technical constraints broadcasters and other program producers face."⁹ Further, §613(d)(1) of the Telecommunications Act empowers the Commission to

⁵ *HBI Comments* at 13.

⁶ *Joint Comments of Cosmos Broadcasting Corp., Cox Broadcasting Inc., Media General Comm. Inc. and Meredith Corp.*, Closed Captioning of Video Programming, CG Docket No., 05-231 (filed Nov. 10, 2005) at 6.

⁷ 47 C.F.R. §79.1(b)(i)(iv)(Contains the January 1, 2006 deadline for all English-language non-exempt programming to be captioned.)

⁸ *HBI Comments* at 4-6.

⁹ *NAB Comments* at 3.

exempt programs and services where closed captioning would be "economically burdensome to the provider or owner of such programming."¹⁰ The record in this proceeding demonstrates *any action* by the Commission increasing real-time captioning obligations urged by TDI is 'economically burdensome' to television broadcasters, and disproportionately so in smaller markets. Real-time captioning services are costly, in short supply, and are contributing to the fading profitability of local news and other local programming.

Cost Burdens. Real-time captioning services cost between \$100 and \$500 an hour.¹¹ For smaller market television stations, this hourly rate conservatively translates into approximately \$146,000 to \$178,000 in annual expenditures.¹² The only feasible alternative would be hiring full-time captioners as station employees, and even this "appears to cost a minimum of \$200,000 per year for twenty-two hours of newscast programming each week."¹³ And as explained below, there are not enough captioners available.

While \$200,000 represents a large price tag for any programming provider, real-time captioning services are 'disproportionately burdensome' to smaller broadcasters. For example, every \$20,000 represents about one news reporter's salary in a small market station.¹⁴ For

¹⁰ 47 U.S.C. §613(d)(1).

¹¹ *NAB Comments* at 7.

¹² *HBI Comments* at 2. *See id.* at Exhibit B (HBI captioning hourly rate estimates are conservative, between \$260 and \$115 per hour. Indeed, using NAB's hourly rate estimates, HBI's annual captioning projections would increase to as much as \$594,500 for WDIO and \$487,500 for KAAL. Alarming, the combined costs for captioning both WDIO and KAAL would exceed *one million dollars*, using the NAB estimates. Both WDIO and KAAL are small stations in DMAs over 100. WDIO is located in the Duluth, MN-Superior, WI, DMA which is ranked at 137. KAAL is located in the Rochester, MN-Mason City, IA-Austin, MN, DMA which is ranked at 152.)

¹³ *Joint Comments* at 5.

¹⁴ *HBI Comments* at 5. *See also Comments of the Radio Television News Director's Ass'n*, CG Docket No., 05-231 (filed Nov. 10, 2005) at 5 ("*RTNDA Comments*").

WDIO-TV and KAAL, \$200,000 would translate into approximately the full annual cost of each of their entire news reporter staffs. Thus, while the proposed new captioning requirements would vastly increase the costs of local news production, not *one minute* of new programming would be gained.

Captioning Shortages. The record in this proceeding demonstrates a critical shortage of captioners and captioning services in the marketplace. One captioning firm stated that "the availability of trained competent captioners will be severely tested [, and r]eal-time captioners are not being trained quickly enough."¹⁵ A recruiter for World Wave, another captioning provider, stated that she is in need of more captioners "in every major market in the country."¹⁶

Real-time captioners, especially, are in short supply.¹⁷ As reported by one captioner, court reporting schools have dreadful state board certification pass rates. The captioner reported that the November 2004 and May 2004 California captioner certification pass rates ranged between 11-22%.¹⁸

Market consolidation and employee shortages created an industry monopoly of large captioning firms and one captioning firm contended that the "monopolistic and predatory nature" of captioning firms may cause them to establish quality standards and drive up price to the detriment of broadcasters and other programming providers.¹⁹ "In short order, video programmers from existing to new networks will be faced with a significant rise in per hour costs of captioning, which may well be the intended objective of certain companies actively pursuing

¹⁵ *Comments of Media Captioning Services*, CG Docket No., 05-231 (filed Nov. 10, 2005) ("MCS Comments") at 16.

¹⁶ *Joint Comments* at 4.

¹⁷ *MCS Comments* at 16.

¹⁸ *Id.*

¹⁹ *Id.*

federally mandated closed captioning 'standards.'" ²⁰ In recognizing these concerns, Media Captioning Services acknowledged that, "[w]e . . . appreciate the cost considerations for stations in DMA markets 26-100, where advertising rates may not support the cost of closed captioning."²¹

More problematic than the shortage of captioners and the prospect of price-gouging, is organizations in support of greater captioning obligations have not examined the captioner shortage issue. The Alexander Graham Bell Association simply stated that it will "encourage recruiting efforts."²² The National Captioning Institute, a leading captioning firm, avoided the issue altogether by stating "[i]t is difficult to predict the impact of the final increase in captioning requirements, but based on the past, *it seems reasonable to assume* that supply will rise to the level of demand."²³ Broadcasters should not face forfeiture penalties based on *encouragements* and *assumptions*. It would be irrational for the Commission to grant any part of the TDI Petition when the record is clear that the costs far outweigh the benefits and the captioning industry is unable to support the proposed obligations with the necessary captioners, even at inflated prices.

Local News Profitability. The Radio and Television News Director's Association/Ball State University Annual Survey, paints a bleaker picture for the profitability of local news, without even considering additional captioning obligations plead by TDI.²⁴ The study

²⁰ *Id.*

²¹ *Id.*

²² *Comments of the Alexander Graham Bell Ass'n*, CG Docket No., 05-231 (filed Nov. 10, 2005) ("Bell Comments") at 6.

²³ *Comments of the National Captioning Institute*, CG Docket No., 05-231 (filed Nov. 10, 2005) at 5 ("NCI Comments") (*emphasis added*).

²⁴ *NAB Comments* at 8.

establishes an overall decline in the profitability of television news.²⁵ Between 2004 and 2005, the number of television news operations producing a profit declined from 58.4% to 44.5%, the number merely breaking even rose from 10.4% to 24.2%, and the number operating at a loss increased from 9.2% to 12.1%.

As the record in this proceeding reflects, increased captioning obligations would have the unintended consequence of undermining the Commission's localism policies.²⁶ Factoring in the additional closed captioning requirement costs, small market broadcasters could increase their profits more than 55% by substituting syndicated programming for local news programming.²⁷ There would be similar incentives to eliminate other locally produced programming, for example local sports, cultural and charity events.²⁸ If small market local news becomes an unprofitable enterprise, the FCC will see fewer broadcasters, such as HBI, committed to local news programming. HBI's KAAL broadcasts 897 hours per year, and WDIO broadcasts 1,118 hours per year, of regularly scheduled, locally produced news programming.²⁹ These kinds of commitments to local programming would become a rarity.

In its Comments to this proceeding, the RTNDA captured the vanishing localism concept best in the context of live breaking news captioning. It stated the: "[d]raconian application [of the closed captioning rules] will serve only to discourage local stations from pursuing timely and

²⁵ *NAB Comments* at note 17.

²⁶ *NAB Comments* at 6. *HBI Comments* at 6. *RTNDA Comments* at 3. See also Broadcast Localism, Notice of Inquiry, FCC 04-129 (rel. July 1, 2004).

²⁷ *HBI Comments* at 6. (This 55% figure uses the HBI conservative estimates for captioning costs. Using a \$500,000 annual closed captioning cost figure, syndicated programming would increase broadcasters' profits by more than 66%.)

²⁸ *HBI Comments* at 4-7.

²⁹ *HBI Comments* at 5 (WDIO-TV also broadcasts 71 hours per year of regularly-scheduled, locally produced non-news programming such as, local sports and community fund-raisers. KAAL broadcasts 78 hours per year of similar programming.)

aggressive news coverage. Stations would eliminate risk of FCC fines by sending their news teams away to safety and showing Three Stooges re-runs."³⁰

B. Some Captioners Recognize Broadcaster Cost Considerations but Fail to Address Them Adequately

To ease cost burdens, a TDI-supportive captioner, Media Captioning Services, suggested a four-year transition period. The transition period assumes that more captioners in the interim period will enter the labor market resulting in presumed price declines. Media Captioning Services also suggested government subsidies for very small stations. For stations with revenues under \$3 million, the group proposed funding small market captioning with proceeds from the auction of analog television spectrum.³¹

While it is clear that Media Captioning Services recognizes some of the economic realities of broadcasting, its proposal missed the mark. A four year transition period is unsupported by any evidence of effectiveness. The subsidy suggestion is similarly without authority or support. Obviously, even the proponents of additional captioning recognize that the burdens far outweigh the benefits, at least for now.

C. The Deaf Community Has Not Put Forth a Cohesive and Manageable Error Rate Standard

In addition to the loss of ENT, TDI proposed captioning quality standards and an FCC base forfeiture of \$8,000 per hour with captioning errors.³² There is nothing in the record which would enable the Commission to articulate a clear and transparent 'error' standard. Moreover, the commenters have failed to link existing captioning errors to an enforcement deficiency.

³⁰ *RTNDA Comments* at 12.

³¹ *Id.* at 13-14.

³² *TDI Petition* at 22-23.

Basing an error standard or a proposed forfeiture on the present record would be arbitrary and capricious.

The deaf and hard of hearing community lack an enforceable error rate methodology for closed captioning. No TDI Petition supporter provided an error rate method that meaningfully guides programming providers. Instead, what appears in this proceeding are impulsive reactions to closed captioning containing little understanding of the broadcast industry. Of the hundreds of deaf commenters in this proceeding, only two have proposed a system for monitoring the error rate, WGBH National Center for Accessible Media ("WGBH Center") and Accessible Media Industry Coalition ("AMIC"). Most supporters of TDI simply asked the Commission to 'caption all programs' or 'make quality captioning for television.'

WGBH Center and AMIC propose impractical error standards for live programming. WGBH Center would require 99% accuracy for real-time captioning. That standard is too restrictive because it cannot be achieved with current technology, even at very high prices.³³ Indeed, it is difficult for a captioner to guarantee an 85% accuracy rate let alone the higher rates proposed.³⁴ In addition, an 'error' under the WGBH standard would include *any* instance in which the words spoken in the audio portion of the program do not match the corresponding text.³⁵ Thus, under the WGBH standard, if a captioner edits adult content or corrects the text for

³³ *MCS Comments* at 7 (suggests a 95% error rate for real-time captioning.) *HBI Comments* at 7-8 (the difficulty of maintaining virtually error-free captions is aptly demonstrated by the closed captions in the FCC's Open Meeting. In our review of the October 2005 Open Meeting, the following errors occurred: 200 instances of omitted text, 40 instances of incorrect words and 70 misspelled words. All of these errors appeared during the meeting which was less than one hour in duration.)

³⁴ *Joint Comments* at 9 (A big four-affiliate noted, "it requires a long time exposure [for a captioner] to gain a non-technical quality standard of more than 85%").

³⁵ *Comments of the WGBH National Center for Accessible Media*, CG Docket No., 05-231 (filed Nov. 10, 2005) ("WGBH Center Comments").

proper grammar, its customers (video programming providers, including broadcasters) would be subject to the \$8,000 proposed FCC forfeiture even for reasonable and good faith decisions.

Similarly, AMIC suggests the "16 CARAT Approach to Caption Quality" which also would be impractical to implement. The AMIC standard allows for a 95% accuracy for live programming. But, its analysis process is too cumbersome and may lead to many error-rate challenges. For example, in order for captions to be 'complete' under the AMIC rules, the test employs a 7-factor analysis.³⁶ That standard would require that verbal sounds such as "ummm" and "ah" be captioned, as well as long pauses and ambient sounds, under the accuracy requirement.³⁷ This is simply too cumbersome for the average captioner.

The AMIC test also would exhaust Commission enforcement resources. Nearly every captioning complaint would be subject to FCC review, oversight and challenges. Even proposed "mitigating factors" would lead to many filings with the Enforcement Bureau. Questions would include: "what would be an adequate technical error rate? Would different error rates be used for each field? How would the Commission consistently measure clarity?" AMIC even recommends additional review by an 'expert' in the field of captioning for compliance disputes.³⁸ Such procedures would waste valuable Commission and private resources.

Captioners fail to accept that language and auditory sounds are inherently subjective and cannot be molded easily into a quantitative methodology. Base forfeitures combined with inadequate error rate standards create a dangerous and unfair combination. Programming distributors, including broadcasters will face fines even when attempting to comply diligently

³⁶ *Comments of the Accessible Media Industry Coalition*, CG Docket No., 05-231 (filed Nov. 10, 2005) ("AMIC Comments").

³⁷ *Id.*

³⁸ *AMIC Comments* at 9.

and actually achieving high accuracy rates at stiff prices. Thus, the Commission should heed its earlier conclusion: "[m]easuring and monitoring a specific percent, e.g., minutes, words or some other criteria" would be difficult, result in "unclear" standards, and "would impose unnecessary burdens on programming providers and the Commission to implement and enforce."³⁹

III. CONCLUSION

The record collected in this proceeding makes it clear that the TDI Petition must be denied because the burdens imposed would vastly exceed any possible benefits.

Respectfully submitted,

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³⁹ *Comments of Home Box Office, Inc.*, CG Docket No., 03-231, C Filed Nov 10, 2005) at 11. (citing *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility*, Order on Reconsideration, 13 FCC Rcd. 19973, 19993 (1998).)